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THE FIRST AMENDMENT AND TELEVISION BROADCASTING BY SATELLITE

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Some questions are better left unasked; the peril of finding out the true answer is too great. One such question is whether people within the United States have the right, free of governmental restraints, to receive speech from abroad and to send speech to those outside the nation's boundaries. At first blush, the issue seems a simple one. But an examination of existing government behavior and first amendment theory forecloses simple solutions. The difficulty has become clear to the United States Department of State as it joins in a late and little known round of debate about the amendment and international control over the direct broadcast satellite.[1] Many nations have called for international limits on the content of direct satellite broadcasts and for national consent before a signal could be purposely beamed at a state.[2] American representatives to international organizations at first urged that the proposed restraints violate domestic constitutional requirements of freedom of speech and press.[3] Without totally abandoning that

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1 For an early comment, see Ruddy, *American Constitutional Law and Restrictions on the Content of Private International Broadcasting*, 5 INT'L LAW. 102 (1971); Straschnov, *Comments on the Draft Convention Against Unauthorized Distribution of Programme-Carrying Signals Transmitted by Satellites*, 19 BULL. COPYRIGHT SOC'Y OF U.S. 429 (1972). Many of the issues are also treated in ASPEN INSTITUTE PROGRAM ON COMMUNICATIONS AND SOCIETY, CONTROL OF THE DIRECT BROADCAST SATELLITE: VALUES IN CONFLICT (1974) [hereinafter cited as ASPEN INSTITUTE].

2 *See* G.A. Res. 2916, 27 U.N. GAOR Supp. 30, at 14, U.N. Doc. A 2916 (1972) [hereinafter cited as G.A. Res. 2916]. *See also* Draft Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information[,] the Spread of Education and Greater Cultural Exchange, UNESCO Doc. 17 C/76 (1972).

3 *See, e.g.*, Ruddy, *supra* note 1 (Mr. Ruddy was then Assistant General Counsel of the United States Information Agency). The hard-line position was most toughly stated by Frank Stanton (former president of Columbia Broadcasting System):

> Regardless of what body exercises the power of the censor, the effect of both the Soviet Union draft and the UNESCO draft is to

posture, the United States has perceptibly altered its position after a lonely isolation on the issue. The international community is now urged to adopt a declaration of principles rather than a binding convention that would have the force of law.[4] But even as these principles are in the process of being drafted, the United States has had trouble preventing international positions that conflict with the free flow of information.[5]

American representatives are to be commended for urging standards for the international community which, on analysis, are closer to the ideal than the record of the United States. A divorce between goal and reality is not unusual, and a first amendment of the temple[6] rather than of the marketplace is to be preferred.[7] But the reality of first amendment practice lurks in the background, an uninvited guest in the elegant halls of international discourse. In shaping a set of international principles, foreign states may appropriately inquire into the pattern of United States government restraints on information coming from abroad or on programs violating certain content standards.

I.

A. *The Impact of Satellite Broadcasting*

To understand the relevance of the American experience in the regulation of televised and other speech, it is important to have a sense of the issues raised by the direct broadcast satellite. A direct broadcast satellite, like the current generation of communications satellites, will hang in geostationary orbit, appearing to take a fixed position with respect to earth.[8] There is vigorous debate

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> make it possible for every signatory government to assert control over the content of international broadcasts. Quite seriously, I do not see how our government, given our Constitution, can possibly enter into any agreement in which the rights of Americans to speak to whomever they please when they please are bartered away. And that is what both draft documents would do.

Speech at WREC Fiftieth Anniversary Ceremonies, Memphis, Oct. 4, 1972.

[4] *See* Committee on the Peaceful Uses of Outer Space, Report of the Legal Sub-committee, U.N. Doc. A/AC. 105/147, at 6 (1975) [hereinafter cited as Legal Sub-committee Report].

[5] *See* text accompanying notes 29-38 *infra.*

[6] *See, e.g.*, Meiklejohn, *The First Amendment Is an Absolute*, in 1961 THE SUPREME COURT REVIEW 245 (Kurland ed.).

[7] *See, e.g.*, Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1076 (1973); Anthony, *Towards Simplicity and Rationality in Comparative Broadcast License Proceedings*, 24 STAN. L. REV. 1 (1971); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

[8] There is an abundance of material on the technology and policy implementations of direct broadcast satellites. *See, e.g.*, Chayes & Chazen, *Policy Problems in Direct Broadcasting Satellites*, 5 STAN. J. INT'L STUD. 4 (1970).

about the pace at which direct broadcast satellite technology will mature.[9] Less subject to question is the structure of the resulting system.[10] The satellite is merely a transmitter of signals which it sends to receiving stations or antennas on earth. At present, these earth stations must be enormously powerful because the transmitting power of the current generation of satellites is relatively low. Earth stations are expensive, and the result is that the satellite, under current enginering, is used primarily for point-to-point communication where the cost of satellite transmission is lower than the cost of transmission via terrestrial long-line cable.[11] Modest advances in technology will alter this pattern. Already, the United States has experimented with a satellite designed to bring service to community receivers in the Rocky Mountain states, and the same satellite is being used to transmit to approximately 5,000 villages in India.[12] From the community receiver, the next step is a receiver in the home, taking signals directly from the satellite with no intervening community, regional or national control point where the incoming signals could be monitored and filtered.

In its final flower, the direct broadcast satellite undoubtedly will be a potent instrument for reaching across national borders to transmit information, education, cultural events and commercials.[13] It is hailed as a new device for binding the world together and serving the cause of peace.[14] But its coming is also feared. The satellite is seen as another step in a kind of information imperialism leading to substantial control, whether intentional or not, over the less developed countries through direct media access to community centers or individual homes from sources in the major developed nations.[15]

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[9] *Compare* Committee on the Peaceful Uses of Outer Space, Report of the Working Group on Direct Broadcast Satellites, U.N. Doc. A/AC.105/127 (1974) [hereinafter cited as Working Group Report], *with* de Sola Pool, *Direct Broadcast Satellites and the Integrity of National Cultures*, in ASPEN INSTITUTE, *supra* note 1, at 27. Dr. Pool states that "there is no imminent prospect of direct satellite TV broadcasts to countries that do not wish to receive them." *Id.* The Report states that "Japan was planning to launch a medium-size experimental broadcast satellite in 1976 or 1977 . . . ." Working Group Report, *supra* at 7.

[10] *See, e.g.*, Dugmore, *The Newest Frontier in Communications: The Direct Broadcast Satellite*, 13 JAG L. REV. 259 (1971).

[11] *See generally* AM. SOC'Y OF INT'L LAW, DIRECT BROADCASTING FROM SATELLITES: POLICIES AND PROBLEMS 3-7 (1975).

[12] *Id.* at 5.

[13] The international law status of national mechanisms for the control of information flowing across state borders is beyond the scope of this Article. Two interesting essays are available: Hargrove, *International Law and the Case for Cultural Protectionism*, in ASPEN INSTITUTE, *supra* note 1, at 85; Buergenthal, *The Right to Receive Information Across National Boundaries*, in *id.* at 73.

[14] *See, e.g.*, remarks of Sulwyn Lewis, *quoted in* ASPEN INSTITUTE, *supra* note 1, at 37.

[15] *See* de Sola Pool, *supra* note 9, at 27-33.

With its potential ability to reach into homes with ease, the direct broadcast satellite expands the opportunity for the free flow of information. But it can also disrupt the delicate techniques now used to balance the inward flow of information against the need to preserve and enhance national identity. In some cases, the governments may be concerned that the information and views that directly reach the people will lead to greater political opposition. Some governments fear the impact of Soviet information and propaganda. Others may fear ideas and information coming from the United States. Some envision a future in which two systems of direct broadcast satellites, each dominated by a superpower, rain signals on the nations within their sway. Another concern is the lack of a genuine exchange among the nations. The principle of free flow of information would be more palatable if it were not unidirectional or almost so.[16] The less developed countries are media poor and information poor, in the Western sense. Each piece of external information takes on great significance. Often the nations are only recently independent. They yearn to develop their own political and national identity. Control over communications is a way to reach that goal; foreign-source information is an obstacle.

Economic motives may also prompt regulation of the international flow of information. Perhaps eighty percent of the nations have government or monopoly television systems.[17] Even in nations with more than one system, such as the United States, existing distributors of television signals bear public interest responsibilities. In the United States, for example, there are quasi-duties to provide news and information in a balanced fashion,[18] to behave in a way that enhances the electoral process,[19] to refrain from programming that is unsuitable for children or could be classified as obscene,[20] and to provide service on an equitable basis throughout the country, serving rural and urban areas alike.[21] Unregulated entry of direct broadcast satellite signals could pose a threat to the economic structure that underpins the sanctioned system for distributing television signals.[22]

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16 *See, e.g.*, B. PAULU, RADIO AND TELEVISION BROADCASTING ON THE EUROPEAN CONTINENT 150, 208-09, 214-16 (1967); W. DIZZARD, TELEVISION—A WORLD VIEW 155-78 (1966).

17 *See, e.g.*, B. PAULU, *supra* note 16, at 52-89.

18 *Cf., e.g.*, 47 U.S.C. §§ 315, 399 (1970).

19 *Id.* § 315; *cf.* Comment, *Right of Access to the Broadcast Media for Paid Editorial Advertising—A Plea to Congress*, 22 UCLA L. REV. 258 (1974).

20 *See* notes 105-07 & accompanying text *infra*.

21 *Cf.* 47 C.F.R. § 73.30 (1973). The validity of these restrictions and burdens is mildly open to question as a result of several recent Supreme Court decisions. *See, e.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

22 In Canada, the debate over American signals on cable systems has

B. *The International Response*

These international concerns found a focus in August 1972, when the Soviet Union submitted to the United Nations General Assembly a draft international convention calling for strict controls over satellite broadcasting.[23] The Soviet proposals, which were warmly received, would have imposed a consent requirement and would have considerably limited the content of the messages that could be transmitted via satellite. Article III of the Soviet Draft Convention specified the permissible uses of the satellite: "enhancing the educational level of the population, developing culture and expanding international exchanges in the fields of science, culture and sport."[24] Forbidden purposes were listed in Articles IV and VI. A later draft provided that states would agree to exclude material which

> publicizes ideas of war, militarism, national and racial hatred and enmity between peoples, which is aimed at interfering in the internal domestic affairs of other States, or which undermines the foundations of the local civilizatition [*sic*], culture, way of life, traditions or language.[25]

In the following months this proposal was debated heatedly, and in November 1972, the General Assembly voted to refer the matter to its Committee on the Peaceful Uses of Outer Space.[26] The resolution recited both the potential benefits of satellite broadcasting and the need to respect the sovereignty of states in its use, and

raised these issues; they also lurked in the background of the pirate station controversies of the 1960's. *See* text accompanying notes 53-55 *infra*.

23 U.N. Doc. A/8771 (1972).

24 *Id.* at 5.

25 U.N. Doc. A/AC. 105/127 (1974) Annex II, at 2. The 1972 draft of Article VI listed six categories of broadcasts for which international liability could be incurred:

(a) Broadcasts detrimental to the maintenance of international peace and security;
(b) Broadcasts representing interference in intra-State conflicts of any kind;
(c) Broadcasts involving an encroachment on fundamental human rights, on the dignity and worth of the human person and on fundamental freedoms for all without distinction as to race, sex, language or religion;
(d) Broadcasts propagandizing violence, horrors, pornography and the use of narcotics;
(e) Broadcasts undermining foundations of the local civilization, culture, way of life, traditions or language;
(f) Broadcasts which misinform the public on these or other matters.

U.N. Doc. A/8771 (1972) at 6. Parts (a), (b) & (e) were incorporated in Article IV of the 1974 version; the remaining provisions were dropped, as was a prohibition of programming "immoral or instigating in nature." U.N. Doc. A/AC. 105/127 (1974) Annex II, at 5.

26 G.A. Res. 2916, *supra* note 2. *See also* Report of the First Committee to the General Assembly, U.N. Doc. A/8864 (1972). For a brief history of the Soviet initiative, see Symposium, *The Control of Program Content in International Telecommunications*, 13 COLUM. J. TRANSNAT'L L. 1, 15 n.29 (1974).

it requested the Outer Space Committee "to elaborate principles governing the use by States of artificial earth satellites for direct television broadcasting with a view to concluding an international agreement or agreements."[27] The United States, standing on a priestly view of the first amendment, cast the only vote against this resolution.[28]

The United States' initial reaction can easily be understood. The list of prohibitions submitted by the USSR was a first amendment chamber of horrors. But the extreme American stand was difficult to justify. It did not adequately reflect a sensitivity to the concerns of other countries over the one-way flow of information and programming, and it did not fully reflect an intricate sense of domestic first amendment practices. The harm of an unproductive, isolated position led to a good deal of discussion and self-examination on the issue between 1972 and 1974.[29] As a result, the American stance has been tempered.

The forum for this change has been the Legal Sub-committee of the General Assembly's Committee on the Peaceful Uses of Outer Space, the Working Group of which completed its report in March 1975.[30] Since the Working Group operates by consensus, its product where there is no dissent reflects a position to which the United States currently assents.[31]

The report, by stating alternative positions where no consensus could be reached, also identifies specific differences among the various nations. It is organized in a way that highlights the remaining free expression concerns of the United States. The document proceeds principle by principle, the text showing the struggle for consensus. For example, in the first principle, "Purposes and Objectives," one important area of disagreement rests in how the function of satellite broadcasting should be described and limited in conforming the satellite's uses to certain international goals.[32] The document expresses differences of approach: Consistent with the first amendment, the United States would assent to a principle which would recognize that direct television broadcast-

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[27] G.A. Res. 2916, *supra* note 2.

[28] 27 U.N. GAOR 2081, at 6 (1972). A more charitable view of the United States' action would be that it has traditionally favored less formal approaches to the resolution of disputes that have only potential significance. The General Assembly's action, in part, was a triumph of the legalistic approach in the French tradition over the common law penchant for evolution of rules.

[29] *See, e.g.*, Symposium, *The Control of Program Content in International Telecommunications*, 13 COLUM. J. TRANSNAT'L L. 1 *passim* (1974).

[30] Legal Sub-committee Report, *supra* note 4.

[31] The most important aspect of the position is its emphasis on elaborating principles, rather than drafting a convention (which would be legally binding).

[32] Legal Sub-committee Report, *supra* note 4, Annex II, at 1-2.

ing should "facilitate and expand the mutual international exchange of information and ideas."[33] Other laudable objectives would also be recognized. But should such a set of objectives be hortatory or binding? Some members of the Working Group insisted that the objectives provide a governing standard for all direct television broadcasting, that "activities in the field of direct television broadcasting by satellite shall be carried out by states exclusively in a manner compatible with the . . . [stated] objectives . . . ."[34] For the United States, a closed-ended statement of exclusive purposes ought to pose first amendment difficulties.[35]

A second area where the Working Group produced alternatives that expose the first amendment differences involves the issue of national consent at the receiving end. The alternatives are as follows:

> *Alternative A*
>
> Direct television broadcasting by means of artificial earth satellites specifically aimed at a foreign State shall require the consent of that State. The consenting State shall have the right to participate in activities which involve coverage of territory under its jurisdiction. This participation shall be governed by appropriate arrangements between the States involved.
>
> . . . .
>
> *Alternative B*
>
> Direct television broadcasting by satellite should be conducted in accordance with the principles set out herein, and in particular in accordance with principle . . . [which relates to participation and cooperation]. It may be subject to such restrictions imposed by the State carrying out or authorizing it as are compatible with the generally accepted rules of international law relating to freedom of expression, which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.
>
> The consent of any State in which such broadcasting is received is not required, but the State carrying it out or authorizing it should consult fully with any such receiving State which so requests concerning any restrictions to be imposed by the former State.

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33 *Id.* at 2 (Alternative B).

34 *Id.* (Alternative A).

35 This problem is linked to a second—the extent to which the federal government can take responsibility for programs that emanate from the United States. The American alternative principle does not restrict the kind of entity that may engage in direct television broadcasting. The opposing draft principle mandates that "activities in the field of direct television broadcasting by satellites shall be carried out by States . . . ." *Id.* Such a principle might be inconsistent with the licensing of commercial television organizations such as the networks.

> The foregoing is without prejudice to the restrictions which may be imposed in accordance with international law on technical grounds.[36]

Alternative B, to which the United States would painlessly adhere, avoids internationally sanctioned compulsory compliance with censorship standards. The principle would not necessarily require consent of a state even if a signal is beamed directly at it. Quite rightly, there is a considerable American fear that acceptance of a consent formula implies acquiescence by the United States in the severely limited broadcasting rules of many prospective receiving states. The principle marks a recognition by the United States that certain restrictions imposed by the receiving state might be compatible with principles of international law and acceptable under a first amendment regime, but this is far from the exporter of information accepting national restraints unilaterally imposed by the country of import.

In terms of content regulation, the Working Group also failed to reach a consensus. For program content, the report of the Working Group of the Legal Sub-committee stated three alternate principles:

> [States or their broadcasting entities which participate in direct television broadcasting by satellite with other States should co-operate with one another in respect of programming, programme content, production and interchange of programmes.]
>
> [The broadcasting of commercial advertising, direct or indirect to countries other than the country of origin, should be on the basis of appropriate agreements between the countries concerned.]
>
> [Notwithstanding the foregoing States undertaking activities in direct television broadcasting by satellites should in all cases exclude from the television programmes any material which is detrimental to the maintenance of international peace and security, which publicizes ideas of war, militarism, national and racial hatred and enmity between peoples, which is aimed at interfering in the domestic affairs of other States or which undermines the foundations of the local civilization, culture, way of life, traditions or language.][37]

The first alternative states the optimal position for free flow of information from the American perspective—a "soft" requirement for consultation among states on issues relating to program content. The last alternative, with its defined code of program standards, adopts the view urged by the Soviet Union with much accord in 1972.[38]

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36 *Id.* at 3-4.

37 *Id.* at 4.

38 *See* U.N. Doc. A/8771 (1972) at 5-6. *See also* text accompanying notes 23-29 *supra*, and text accompanying note 88 *infra*.

II.

Is there any historical explanation—aside from the first amendment—for the gulf between the American view on direct television broadcasting and the stance of other nations? Perhaps one reason for the American position is that, for most of its 200 years, this nation has been spared the anguish and fear that comes from a sense that its culture is controlled from abroad. In the television and radio era, though the United States has had few if any barriers to foreign programming, the percentage of externally produced presentations on the American screen is among the lowest in the world.[39] Several non-legal facts account for the overwhelming American-ness of domestic television programming. Central is the structure of the industry and the way programming decisions are made. American television acquires an audience through programming and subsequently sells the audience to advertisers. The foreign nature of imported programming is almost always inconsistent with the audience maximization demanded by this approach. The size of the United States and its linguistic isolation also account for the absence of foreign programming. Finally, the tradition of American fare has itself become a formidable barrier to entry.

Since the American audience has not been inundated with foreign programming, the need for and constitutional permissibility of federal regulation of excessive foreign cultural influences have not been tested. In first amendment terms, there is no compelling or substantial governmental interest in abridging foreign programming which has little or no effect on the American national identity. But is it true that the inward flow of information could not be curtailed under any circumstances? Only if this is true can the United States properly and forcefully assert in an international forum that the first amendment precludes American accession to a convention legitimating the principle of national consent. An international rule cannot be advocated on the basis of the present state of facts in the United States. However, it is possible to imagine a time when the United States has lost its preeminent position in the packaging and export of information and entertainment. If the volume of programming from abroad increased substantially, the effect on the political system, on jobs, on media structure, and on values might be the subject of legislative inquiry.[40] Here, the expe-

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39 *See* B. PAULU, *supra* note 16; W. DIZZARD, *supra* note 16.

40 There were tremors, though light ones, when BBC exports began to appear in significant number on public broadcasting outlets. Congressional funds, it was argued, should not be used to support British as opposed to American actors. Much the same problem arose in the 1960's when distinguished actors from abroad sought labor permits to appear in Broadway productions. *Cf.* NAIPTD v. FCC, 502 F.2d 249, 257 (D.C. Cir. 1974).

rience of other nations can be useful, for unlike the United States they have felt the sting of unwanted foreign programming. The issues are not exclusive to direct broadcast satellites. Nations have been concerned, throughout the broadcast era, with the cultural, economic, and political hazards of international terrestrial communication. International agreements have been sensitive to the importance of national sovereignty; and states have restricted the domestic broadcast of programs originating in other countries and other cultures.[41]

The clearest examples of national concern are created by external interference with carefully thought-out domestic communications policies. An instructive incident in European frequency management grew out of the effort of Radio Luxembourg and similar continental commercial stations to capture a significant part of the BBC's English audience.[42] The Ullswater Committee, specially appointed in Great Britain in the 1930's to review policies relating to the BBC, concluded:

> [T]he practice of excluding advertisements from broadcast programmes in this country is to the advantage of listeners . . . . In recent years, however, this policy has been contravened, and the purposes sought by the unified control of broadcasting have been infringed by the transmission of advertisements in English from certain stations abroad which are not subject to the influence of the British authorities except by way of international agreement and negotiations.[43]

Those who had been granted the broadcasting concessions in Luxembourg "expressly and frankly confessed that their main object was to broadcast advertising programmes to neighboring countries, particularly those which do not allow advertising in their own national programmes."[44] A series of protests to the International Broadcasting Union (IBU) and the government of Luxembourg were unavailing.[45] In Britain the threat of Radio Luxembourg was aggravated by the rise of wire relay exchanges. As with the growth of cable television today, relay exchanges in the 1930's offered to listeners a choice of broadcast stations they could not receive unaided,[46] and foreign systems were a likely source of program augmentation.[47]

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41 *See* G. CODDING, THE INTERNATIONAL TELECOMMUNICATIONS UNION: AN EXPERIMENT IN INTERNATIONAL COOPERATION 116-30 (1952).

42 2 A. BRIGGS, HISTORY OF BROADCASTING IN THE UNITED KINGDOM: THE GOLDEN AGE OF WIRELESS 339-69 (1970).

43 *Id.* at 350.

44 *Id.* at 354-55.

45 *Id.* at 355.

46 *Id.* at 357.

47 In 1931, the BBC reached agreement with two of the largest relay exchange companies that in return for certain service from the BBC, the relay exchanges would rediffuse only BBC programs. *Id.* at 359. The agreement was

Finally, in May 1933, the Council of the IBU passed two important resolutions. First, the Council resolved that

> the systematic diffusion of programmes or messages, which are specifically intended for listeners in another country and which have been the object of a protest by the broadcasting organisation of that country, constitutes an "inadmissible" act from the point of view of good international relations.[48]

That resolution was directed at Radio Normandy. As to Radio Luxembourg, the IBU Council stated that it

> cannot sympathise with any type of programme which is essentially based on the idea of commercial advertising in the international field . . . . [Furthermore,] the transmission of international programmes by a national organisation, which has not been internationally recognised, might give rise to such serious difficulties and disturb the good understanding between nations so profoundly that the transmission of such programmes despite the absence of international recognition must be considered by the Union as an "inadmissible" element in European broadcasting.[49]

It was, however, the war, and not international agencies, that resolved the issue.[50] Radio Luxembourg remained on the air until two weeks after the outbreak of the war in 1939.[51]

The case of nonlicensed stations broadcasting to Britain from ships offshore during the early 1960's is also illustrative of a nation's interest in preserving the integrity of its own licensed system. British authorities were concerned with both the commercial competition of the so-called "pirates" and the cultural implications of the content of programming by those stations (primarily pop music).[52]

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rendered unenforceable, however, because the Post Office refused to acquiesce in it. *Id.*

48 *Id.* at 360.

49 *Id.*

50 *Id.* at 369. Though there was great difficulty in curtailing the power of broadcasters to reach across national lines, there was an attempt to control the freedom of listeners. In Germany, for example, a criminal statute provided for five years' imprisonment for passing on "detrimental news" picked up from a foreign station. *Id.* at 366. *See also* Gower, *Broadcasting in Germany*, 162 SPECTATOR 294 (1939), *cited in* A. BRIGGS, *supra* note 42, at 366 n.3. Briggs states that the Germans also designed a "People's Receiving Set" designed to receive German stations only. In 1939 there were 3 million such sets in the country. A. BRIGGS, *supra* note 42, at 366.

51 A. BRIGGS, *supra* note 42, at 369.

52 The pirate ship episode is illustrative because it demonstrated again the difficulty of seeking through the IBU and other international organizations the extraterritorial enforcement of a national government's desire to prevent broadcasting into its country. Ultimately Great Britain was obliged to pass the Marine Broadcasting (Offences) Bill which made it a crime for any newspaper to publish information about the programs of pirate ships, for any person to deal or trade or communicate in any way with the personnel of the pirate ships, or for any British citizen to work on such a vessel. P. HARRIS, WHEN PIRATES RULED

Another setting for government content control involves Canada. Private cable systems have successfully captured American broadcast station signals and delivered them to their customers. Since cable in some Canadian cities, such as Vancouver, reaches fifty percent of television households, many homes have a choice between several American and several Canadian signals. As in Great Britain, the government is concerned with both the cultural implications and the commercial pressures resulting from viewers' preference for non-Canadian television. The ability of local television stations to survive has been thrown in doubt by the increased foreign competition. Canada is now attempting to balance greater viewer choice with the political, cultural and economic implications for Canada. Some restrictions are placed on the amount of American programming that can be carried over cables. Other rules permit American programs but permit or require substitution of commercials by the Canadian re-transmitter.[53] Canada has also denied tax deduction rights for advertising placed in Canadian editions of non-Canadian magazines (with several prominent grandfathered exceptions).[54] Here too, the effort was to "help foster in Canadians a sense of themselves."[55]

III.

Two approaches to direct television broadcasting pose the most difficult first amendment problems: national consent (the consent of the receiving country) and international program standards (the code approach). National consent is a relatively easier issue. Why should it be an American constitutional concern whether citizens of other nations receive an unfiltered spectrum of information? Indeed, American practice has already recognized, to some extent, the kinds of comity concerns that are reflected in a national consent rule.

Current regulations dealing with international mail are highly relevant to the direct broadcasting satellite issue, since they indicate

THE WAVES 140-64 (2d ed. 1968). The law extended British jurisdiction to such pirate ships even if they were beyond the territorial limits. *Id.*

After the passage of the Marine Offences Act, the operator of Radio Caroline indicated that he was considering appealing to the European Commission for Human Rights. *Id.* at 190. That body announced that Article 10 of the Commission's convention gave no ground for hope to the pirates. The convention stated that "everyone shall have the right of freedom of expression . . . regardless of frontiers." But it went on to say: "This shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises." *Id.* *See also* Smith, *Pirate Broadcasting*, 41 S. CAL. L. REV. 769 (1968).

53 These developments are discussed in Johansen, *The Canadian Radio-Television Commission and the Canadianization of Broadcasting*, 26 FED. COM. B.J. 183 (1973).

54 Gotlieb, *The Transnational Flow of Information: A Canadian Perspective*, 68 AM. SOC'Y INT'L L. PROCEEDINGS 127, 131 (1974).

55 *Id.* (quoting the 1972 report of the Davey Commission).

some respect for principles of comity. The United States has agreed, through the Universal Postal Union, to refuse to accept "[m]atter addressed to foreign countries posted in violation of law or treaty stipulation."[56] The regulations also prohibit, in the domestic mail,

> [a]ny matter of a character tending to incite arson, murder, assassination, treason, insurrection, or forcible resistance to any law of the United States, or containing any threat to take the life of, or to inflict harm upon, the President of the United States.[57]

The mechanism for determining mailability is not wholly clear. The postmaster, when a determination of nonmailability of a letter or package is challenged, must submit a sample or a statement of the facts to the Rates and Classifications Department and await instructions.[58] When the suspect material is "written, printed or graphic matter," and its mailability is questioned, the Inspection Service must be notified.[59]

Since the United States does not accept for mailing articles prohibited in the receiving country,[60] it is useful to itemize some of the formal prohibitions acknowledged by countries according to the United States Postal Service. Argentina, for example, forbids "communist propaganda."[61] Australia prohibits "[p]rinted matter considered by the Australian customs authorities as unduly emphasizing crime, horror or sex, or having a depraving effect."[62] Many countries restrict the entry of exposed motion picture film and broadcasting equipment.[63]

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56 UNITED STATES POSTAL SERVICE, POSTAL SERVICE MANUAL § 123.44c (1975). *See also* UNITED STATES POSTAL SERVICE, INTERNATIONAL MAIL (1974): "Packages known to contain articles prohibited in a country are not accepted for mailing." *Id.* § 312.31.

57 POSTAL SERVICE MANUAL, *supra* note 56, at § 123.44e.

58 *Id.* § 123.33.

59 *Id.* § 123.32.

60 INTERNATIONAL MAIL, *supra* note 56, at § 312.31.

61 *Id.* at appendix (alphabetic listing of countries).

62 *Id.*

63 Such countries include Burma, China, U.S.S.R., Rumania. *Id.* Other restrictions have a relation, though remote, to content. Indonesia, for example, prohibits the entry of books and magazines printed in the Indonesian language outside Indonesia unless the books are approved. *Id.* Hungary has quantitative limits: No addressee can receive more than three each of books, magazines or photographs. *Id.* Korea attempts to restrict Postal Union Mail to material addressed in one of seven languages. *Id.* The Soviet Union prohibits the import of games and toys "of a militaristic nature." *Id.*

All these examples assume that the United States can constitutionally be party to an international arrangement for the exchange of information where one party-state reserves the right to censor; for aesthetic, if not constitutional, reasons, it might be unpalatable for the United States to agree to take on the censoring functions that each mail-receiving country reserves to itself. Under such a view, the United States cannot agree that it will open mail destined for the Soviet Union and refuse to expedite the offending letters to the gates of the receiving country. The first amendment may prohibit the government from acting as

Another font of regulation bearing on the direct broadcast satellite is the perceived need to protect a regulated carrier of information from unrestricted competition by a new entrant in the spectrum. National consent may have such an anticompetitive underpinning. Radio stations sought protection from television; television sought protection from cable. Stations that had a monopoly in small markets obtained protection from new television competition. The regulatory approach, one that has significant content implications, is germane to the development of the direct broadcast satellite because unrestricted satellite transmissions are likely to eat away at the audience of domestically licensed television stations.

This argument for regulation of satellite broadcasts is similar to arguments made in the recent debates about the FCC's jurisdiction over wired systems and over non-broadcast programming originated by those systems. The FCC, which was at first wary of extending its power, ultimately determined that it could assert its authority. One argument that was convincing to both the FCC and the United States Supreme Court was based on the competitive nature of the cable television offering. Regulating broadcast television would make little sense if the cable systems could play havoc with the table of allocations, with the fairness doctrine, and with countless other regulatory niceties. The Supreme Court, in two cases,[64] determined that the FCC had fairly extensive jurisdiction, relying on the general language creating the FCC:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United

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censor on behalf of countries that have the right to censor themselves. But what if a different arrangement were conceived? Suppose the government of Argentina said that, for efficiency's sake, they would like to station a censor in New York who would go through all mail directed to Argentinians and conduct the censorship operation on American soil. The government would do no more than deliver the mail to the Argentinian who could, one supposes, be called "the post office" of that country for purposes of appropriate legal delivery. Beyond this, one could imagine a more sophisticated mechanism, where the screeners of information are international civil servants with sufficient authority in their own stead or as explicitly delegated agents of the censoring agencies in the receiving countries.

In the domestic satellite sphere, a similarly distasteful arrangement would work as follows: The United States would require that broadcasts to persons outside the United States originate from specified ground stations. Those ground stations would be under the jurisdiction of international customs agents (or representatives of the receiving countries). These officials would review the material to determine whether it had been accepted by the appropriate broadcasting organization or government entity in the receiving country. If the tape or message had not been approved, other techniques would have to be pursued.

[64] United States v. Midwest Video Corp., 406 U.S. 649 (1972); United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

> States a rapid, efficient, nation-wide, and world-wide wire and radio communication service . . . .[65]

The Court also relied on the language which provides that the Act "shall apply to all interstate and foreign communication by wire or radio . . . which originates and/or is received within the United States . . . ."[66]

In *United States v. Midwest Video Corp.*,[67] a plurality of the Court approved the FCC's regulatory goal: "to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States . . . ."[68] This definition of authority went beyond the clearest basis for decision in *United States v. Southwestern Cable Co.*,[69] namely the regulation of cable television to the extent that it was reasonably ancillary to the regulation of broadcast television.

Either of the above grounds for regulation might justify FCC jurisdiction over signals emanating from a direct broadcasting satellite. The growth of such a transmission system would have a substantial impact on the national television structure. Unregulated programs delivered by direct broadcast satellite could so impair the market for terrestrial transmissions that traditional broadcast licensees would be economically hindered in their capacity to serve the public interest. Beyond that, the Commission might determine that, as with the local origination requirement involved in cable,[70] or the limits on film and sports on pay television,[71] some affirmative obligations should be placed on direct satellite transmissions so as to "promote maximum television service to all the people."[72] Indeed, unless a treaty barred such FCC regulation, and unless the Congress explicitly forbade the Commission from asserting jurisdiction over signals emanating from direct broadcast satellites, it would be surprising if the FCC did not assert such power at some time in the future.

What the FCC could do if it asserted jurisdiction is a difficult question, and would turn, to some extent, on the powers open to a state under the treaty or convention and, of course, on disputes concerning the scope of the Communications Act of 1934.[73] If a

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65 47 U.S.C. § 151 (1970).
66 *Id.* § 152(a).
67 406 U.S. 649 (1972).
68 *Id.* at 666, *quoting* Second Report and Order, 2 F.C.C.2d 725, 745-46 (1966).
69 392 U.S. 157 (1968).
70 *See* United States v. Midwest Video Corp., 406 U.S. 649, 652-56 (1972).
71 47 C.F.R. § 76.225 (1975).
72 406 U.S. at 666.
73 47 U.S.C. *passim* (1970).

"consent" regime were established, then FCC certification might constitute the consent of the United States for a particular transmission. In the absence of such certification, the entity or individual seeking access to an American audience would be prevented by the manager of the foreign earth station from beaming his message to this country.

The FCC might impose standards on persons who wished to deliver signals via satellite. Under the regulatory analysis, it would not be unconstitutional, for example, for the FCC to require that all signals sent into the United States be delivered to a licensed domestic sender, with the sender responsible for programming under traditional license renewal theories. Or, as the FCC has done with cable television, the Commission could impose obscenity, anti-lottery, and fairness doctrine standards on signals that arrive via satellite. In addition, licensed broadcasters, like other individuals, are subject to the criminal laws, including the remnants of statutes prohibiting advocacy of insurrection, violent overthrow of the government, or encouragement of riot.[74] A broadcaster convicted of these crimes could be denied renewal of a television license. Under the principle of equal treatment, the FCC might seek to establish corresponding restrictions on the content of signals that derive from outside the nation's borders. There may be some doubt about the power of the United States so to regulate activities that originate in another country, but the better view is that such power exists under the objective territorial principle of jurisdiction.[75]

Given all this precedent, a national consent provision is to be preferred over explicit internationally sanctioned content restrictions. But even a relatively simple consent approach has first amendment problems which may turn on the method of administration. If, under the international agreement, the United States is required to screen the outgoing programs of American producers (enforcing the "consent standards" of the receiving states), the American programmer's right to speak has, at least arguably, been unconstitutionally infringed. True, FCC regulations on international broadcasters confine programming to material that reflects favorably on American culture. Indeed, the government, through the Voice of America, bypasses many censorship problems in international broadcasting by itself retaining the international frequencies. By assigning to the Voice of America most of the frequency hours available to the United States, the government can strictly control program content. A consent standard that put the onus

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74 *See* T.I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 97 & *passim* (1970).

75 *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 18 (1965).

on the receiving country to police reception would pose the fewest constitutional problems. Here the United States would be under no obligation to police CBS or other private broadcasters who sought access to the satellite to distribute their programs throughout the world. A nation that opposed such broadcasts would itself be required to police community reception facilities or television receivers.[76]

Of course, a consent provision might be fashioned which discriminates on the basis of the kind of programming transmitted. In this context, various UNESCO recommendations[77] are interesting. The UNESCO draft would distinguish among categories of programming and would differentiate between the rights of individuals and the rights of states with respect to each category of information.[78] As to news, the UNESCO draft holds that

> [t]he objective of satellite broadcasting for the free flow of information is to ensure the widest possible dissemination, among the peoples of the world, of news of all countries, developed and developing alike.[79]

The draft specifies that every effort should be made "to ensure the factual accuracy of the information reaching the public."[80] The source of the news must be identified.[81] But Article V suggests no other constraints on the dissemination of news. As to educational programming, on the other hand, the UNESCO draft states that "each country has the right to decide on the content

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[76] In the 1930's, Germany attempted to control access to foreign news sources by distributing People's Receiving Sets capable of tuning in only national programs. Similarly, in the context of direct satellite broadcasting, frequencies could be assigned by the United Nations so that only a particular frequency band would be beamed at a given state, which could require that sets be manufactured to receive only the permissible band. Such an approach puts the burden on the receiving country to screen out unwanted signals rather than putting the burden on the carrier or the originator. Still, as to the chosen band, the state would have authority to determine what programming could be beamed. Such an approach would probably not be implemented on a program-by-program basis. Rather, a state would issue an authorization to an originating source outside its borders to employ a particular frequency to deliver programming over a period of time. A license, for example, could be issued to the BBC to use a particular frequency radiated to portions of the Middle East.

Under this solution the problem of unintentional radiation remains. Spillover can pose a problem of equal magnitude to purposive broadcasting. The Soviet declaration would require a state to enter appropriate consultations with a third-party state whose territory would be invaded through unintentional spillover. At the least, there should be notice to a third party state of the potential spillover, the steps that are being taken to correct and confine it, the frequencies that will be employed, and the content of programs that will be broadcast.

[77] General Conference, Seventeenth Session 1972, Draft Program and Budget for 1973-1974, 17C/98 Annex—Recommendations, at 3 *passim* [hereinafter cited as UNESCO Draft].

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Cf.* Valentine v. Christensen, 316 U.S. 52 (1942).

of the educational programmes broadcast by satellite to its people. . . ."[82] Where cultural programming is concerned, the UNESCO draft seems to speak to the originating institution rather than the receiving country: "[C]ultural programmes, while promoting the enrichment of all cultures, should respect the distinctive character, the value and the dignity of each, and the right of all countries and peoples to preserve their cultures as part of the common heritage of mankind."[83] Only with respect to commercial advertising does the draft specify that transmission "shall be subject to specific agreement between the originating and receiving countries."[84]

The UNESCO approach seems almost wholly consistent with the first amendment as previously interpreted. The UNESCO restrictions that may be imposed are no greater than those imposed by the Congress on the programming supported by the Corporation for Public Broadcasting.[85] Domestic legislation requires that news be objective,[86] a requirement somewhat more potent than that of factual accuracy. It is possible, of course, that a court might declare unconstitutional the objectivity requirement of the Public Broadcasting Act. While the Supreme Court has upheld the constitutionality of the fairness doctrine, the basis of the decision was the right to hear conflicting and erroneous news.[87] The Commission as arbiter of fairness is a far less intrusive agent than the Commission as arbiter of truth and accuracy.

IV.

The most serious issue in direct satellite broadcasting is whether the United States should accede to international principles which legitimate restrictions on the content of information that flow into the United States. When the United States stood in splendid isolation in the United Nations it was responding to a Soviet resolution that would have prohibited any program

> detrimental to the maintenance of international peace and security, which publicizes ideas of war, militarism, national and racial hatred and enmity between peoples, which is aimed at interfering in the internal domestic affairs of other States, or which undermines the foundations of the local civilizatition [*sic*], culture, way of life, traditions or language.[88]

At first blush, these standards seem wholly incompatible with first amendment standards. Yet, as with the national consent issue, it will be worthwhile to examine analogous American domestic law.

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82 UNESCO Draft, *supra* note 77, at Article VI.

83 *Id.* at Article VII.

84 *Id.* at Article IX.

85 *See* 47 U.S.C. § 399 (1970).

86 *Cf.* 47 U.S.C. §§ 315, 399 (1970).

87 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

88 Legal Sub-committee Report, *supra* note 4, Annex II, at 2. *See* notes 23-29 & accompanying text *supra* and text accompanying notes 37-38 *supra.*

Explicit content regulation is the crudest and least appetizing form of assuring an acceptable flow of information. One might expect that a powerful government born of democratic principles would resort to more subtle methods for affecting content. The accurate measure of freedom of expression then might not be the overt bans, but the mechanisms that have the potential for influencing content. Current regulations, recently renewed and reviewed, provide for FCC licensing of international broadcast stations but only if the service provided "will reflect the culture of this country and . . . will promote international goodwill, understanding and cooperation."[89] This overtly content-oriented regulation has never been judicially challenged. The section was originally met by the "united opposition of the industry and has been attacked in Congress as being an entering wedge for censorship of domestic programs."[90] Aside from the content-oriented standards imposed by the FCC, the government maintains de facto control over international broadcasting originating in the United States by virtue of the Voice of America's virtual monopoly of frequency-hours.[91]

The regulatory agencies of a democratic government also have substantial power to affect the flow of information by determining how much of a scarce resource should be used for speech and program-related activities. Given finite spectrum capacity, an agency must allocate space and time among competing users. Thus, the Communications Act permits the FCC to "[p]rescribe the nature of the service to be rendered by each class of licensed stations,"[92] even though the licensee's speech is, in a sense, inhibited thereby. A license given a station to operate in frequencies reserved for noncommercial broadcasting means the time cannot be used to promote products through advertising. A licensee who holds an amateur radio station license cannot transmit business messages.[93] The courts have consistently held that such regulation

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89 47 C.F.R. § 73.788(a) (1973).

90 C.B. ROSE, NATIONAL POLICY FOR RADIO BROADCASTING 244 (1940).

91 Under the Radio Regulations and international agreements, only a limited number of frequency-hours are available for United States transmissions. The Voice of America (VOA) is not licensed by the FCC; private international broadcasters are. In the recent past, the proportionate share of frequency hours used by the VOA has increased. Indeed, Congress resolved in the Information and Educational Exchange Act of 1948, 22 U.S.C. § 1462 (1970), that the "Secretary shall reduce such government information activities whenever corresponding private information dissemination is found to be adequate . . . ." *Id.* Despite that injunction (or perhaps because of a lack of private applicants), VOA frequency-hour usage has increased to about 440 frequency-hours per day while private transmissions have decreased to about ten percent of that figure. *See* International Broadcasting Stations, 27 P & F RADIO REG. 2d 1641, 1643 (1973).

92 47 U.S.C. § 303(b) (1970).

93 47 C.F.R. § 97.114(c) (1972).

is permissible because of the technological limits on the availability of radio frequencies.[94]

A similar classification power has also been made in parceling out frequencies among the United States, Canada, and Mexico. The FCC and the United States government have been concerned about possible transmitting stations located outside the United States but directing programming at U.S. citizens. In the 1930's, some stations that were denied licenses in the United States tried to move their transmitters to Mexico and to receive American programming there for rebroadcast to this country. The Commission held that it could deny a license to a facility in the United States whose purpose was to transmit material to such a Mexican station for retransmission into the United States.[95] "The character of the programs likely to be arranged and transmitted from the proposed studio does not appear to be such as would promote better international relations or to serve the public interest . . . ."[96] The authority for the FCC action was section 325(b) of the Federal Communications Act[97] which allows the Commission to control radio transmission facilities linked to external stations seeking to reach an American audience. Radio usage designations in the treaties between the United States and Mexico, and the United States and Canada, leave the implication that clear channel authorization was distributed so that the strongest Mexican and Canadian stations (in terms of geographical reach) were spaced away from the common border.[98] The direct implications of the classification power for direct satellite broadcast are not hard to discern. Consistent with the first amendment, some classes of foreign broadcasts

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[94] *See, e.g.*, Gross v. FCC, 480 F.2d 1288 (D.C. Cir. 1973).

[95] *In re* T. Yount, 2 F.C.C. 200 (1935). In Wrather-Alvarez Broadcasting, Inc. v. FCC, 248 F.2d 646 (D.C. Cir. 1957), ABC was applying for a waiver to supply material to XETV, broadcasting to San Diego from Mexico. The court said:

> It is not suggested that the Federal Communications Commission has any authority to control the content of the program which XETV chooses to broadcast. The question is whether the Commission may consider the character of that programming in deciding whether the public interest would be served by authorizing an American network to supply its programs to XETV. . . . We hold only that, in making [an affiliation] . . . decision, the Commission may not altogether exclude from consideration such serious defects of the foreign station's programming as would affect the public interest.

Id. at 651.

[96] 2 F.C.C. at 207.

[97] 47 U.S.C. § 325(b) (1970).

[98] The United States predicated agreements with other countries in the hemisphere upon domestic needs. The allotments of channels and classes to Mexico place all high-powered radio stations far from the United States border. North American Regional Broadcasting Agreement, Dec. 13, 1937, 55 Stat. 1005 (1941), T.S. No. 962. *See also* C.B. ROSE, NATIONAL POLICY FOR RADIO BROADCASTING 241 (1940).

can be practically prevented from penetrating American borders.[99]

A final and subtle regulatory device that has possibly unintended content implications relates to the ownership of radio and television stations. Section 310(a) of the Communications Act requires that licenses for domestic radio or television stations cannot be held by

> any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government . . . or by any corporation organized under the laws of a foreign country.[100]

The statute apparently has not been challenged on constitutional grounds.[101]

Even if the original impetus for the citizenship requirement was not Americanizing the airwaves, one must ask whether it would be reasonable to rely on such an argument if section 310(a) were attacked in the future. The kinds of exceptions made in recent circuit court decisions addressing citizenship classifications would determine the scope and success of such an argument. These decisions have carved out certain areas in which classification on the basis of citizenship might be permitted. For example, in *Jalil v. Hampton*,[102] a case invalidating the similar Federal Civil Service requirements, Judge Bazelon stated that

> [t]he only interest which could possibly rise to [the level of permissible exclusion] . . . is the perceived necessity for employing persons of undivided loyalty in policy-making positions, or positions involving national security interests.[103]

An argument could be made that the airwaves are unique and

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[99] For example, consistent with the first amendment, it could be determined that a certain portion of the time allotted could be used only by governmental transmitters of information. Or a class of content much like the classification for the proposed Indian satellite could be established, requiring that the satellite be used only for educational purposes.

[100] 47 U.S.C. § 310(a)(4) (1970).

[101] For a recent discussion of the rule, see United Artists Broadcasting, Inc., 7 P & F RADIO REG. 2d 7 (1966). Such a requirement might possibly be challenged under recent Supreme Court decisions holding that alienage is a suspect classification. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971); *cf.* Jalil v. Hampton, 460 F.2d 923 (D.C. Cir. 1972); Comment, *Aliens and the Civil Service: A Closed Door?*, 61 GEO. L.J. 207 (1972); 12 COLUM. J. OF TRANSNAT'L L. 581 (1973). But the Supreme Court cases are not dispositive. They deal with state legislation (although it is not clear that this should make a difference), and they admit that there is some room permitted, on a compelling showing, for citizenship-related qualifications. One might suppose that the section 310(a) citizenship requirement is imposed for security reasons, or at least out of a possibly constitutionally impermissible assumption that citizens are more trustworthy than aliens in the image of the United States that they will convey.

[102] 460 F.2d 923 (D.C. Cir. 1972).

[103] *Id.* at 930 (Bazelon, C.J., dissenting).

that special national security considerations are involved in their management. The need to use the radio frequencies in national emergencies is the most obvious indication of the sensitive nature of frequency management.

The citizenship requirement may be attacked and ultimately found unconstitutional. But its existence, its persistence, and the likelihood of its endurance surely results in some reduction in the diversity of voices within the United States. If the statute is constitutional, and if it owes its validity to national security considerations, then, of course, significant implications arise for the power of the United States to regulate incoming signals originating abroad: The federal government could take equivalent steps to protect national security by regulating direct broadcast messages. Under this analysis, an American licensing procedure would be warranted.

International content standards also evoke the continuing concerns in the United States about federal censorship of broadcaster programming. Since this ground has been well covered elsewhere,[104] it is sufficient merely to cite certain of the relevant doctrines. Stretched—but not too far—FCC practices and industry codes speak to many of the issues covered in the content-oriented international approach. For example, the commission has a de facto, if not de jure, interest in broadcasts advocating or showing violence and horrors,[105] pornography[106] and the use of narcotics.[107] Much federal regulation is geared, in theory though not in practice, to moderating the impact of national broadcasting on local areas,[108] though the concern has rarely been for "local civilization culture, way of life, traditions or language."[109] While the FCC has not adopted the principle formally, it will sanction licensees who "encroach on fundamental human rights, on the dignity and worth of the human person and on fundamental freedoms for all . . . ."[110] The code of the National Association of

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104 *See, e.g.*, Comment, *Direct Satellite Broadcasting and the First Amendment*, 15 HARV. INT'L L.J. 514 (1974).

105 *See, e.g.*, Foundation to Improve Television, 25 F.C.C.2d 830 (1970).

106 Station WGLD-FM, 41 F.C.C.2d 919 (1973). *See also* Inquiry into Alleged Broadcasts and Cablecasts of Obscene, Indecent or Profane Material by Licensees, Permittees, or Cable Systems, 40 F.C.C.2d 105 (1973).

107 Yale Broadcasting v. FCC, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973). *See* Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343 (1970).

108 *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1, 7-8 (1968) (statement by Comm'rs K. Cox & N. Johnson).

109 Legal Sub-committee Report, *supra* note 4, Annex II at 4.

110 *See* note 25 *supra*.

Broadcasters contains a similar position.[111] There have been efforts to discipline a radio station that broadcast anti-Semitic programming,[112] and a station that carefully excised network programs advocating the Negro cause lost its license.[113] *Beauharnais v. Illinois*,[114] upholding an Illinois statute that penalized group libel, may be a crippled constitutional doctrine,[115] but it remains testimony to the possible constitutionality of a statute that would penalize persons who slander a racial or religious group.

CONCLUSION

What is the appropriate American stance with respect to international ordering of direct broadcast satellite content? Clearly, it accords with domestic policy and with the spirit of the first amendment for the United States to urge passionately an international regime which fosters the flow of information. But it is also clear that, as interpreted and administered, the first amendment is consonant with an international scheme that classifies the spectrum available for direct broadcast by satellite so that only particular categories of programming could be used. The international community might determine, for example, that initially satellite frequencies could be used only for educational programming. The first amendment would not be hostile to provisions permitting each state to adopt regulations that legitimately protect its own domestic television system from foreign competition. Nor would the first amendment be inconsistent with international regulation of commercial messages. Certain content regulations would mirror specific or implicit constraints on American broadcast media. These include restraints on obscenity and pornography. The extent to which an international constraint on content would be consistent with first amendment norms would depend on the stage, mechanism and degree of sanction for the breach of an internationally set regulation.

More severe first amendment problems would arise if the United States is required to enforce the content regulations im-

111 *But see* Letter to Lonnie King, FCC 72-711 (Aug. 3, 1972) (no intervention where station ran blatantly racist political advertising).

112 *See* Anti-Defamation League of B'nai B'rith Against Station KTYM, 4 F.C.C.2d 190 (1966), *petition for reconsideration denied*, 6 F.C.C.2d 385 (1967), *aff'd*, Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169 (D.C. Cir. 1968); Ad Hoc Committee on the Sugar Bowl, 29 P & F RADIO REG. 2d 70 (1973); United Federation of Teachers, 17 F.C.C.2d 204 (1969). *But see* Letter to Mr. Bernie Imes, Jr., FCC 65-433 (May 19, 1965), *discussed at* 15 P & F RADIO REG. 2d 1101 (1969). *See also* WBNX Broadcasting Co., 12 F.C.C. 837 (1948).

113 Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

114 343 U.S. 250 (1952).

115 *See* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 37 (1965).

posed by receiving countries and the Convention. Here, a gradation of impingements can be constructed and evaluated. If the United States Congress enacted a set of regulations restricting the content of incoming and outgoing programs in the broad manner of the Draft Convention, it would be clearly unconstitutional. But suppose the Draft Convention established mandatory constraints that are generally consistent with the first amendment and permitted member states to add other restraints. The propriety of American adherence to such an agreement might turn on the enforcement mechanism. To require the United States to police content restraints imposed by another country would place the government in the position of choosing and judging programs in just the way that the first amendment forbids. On the other hand, as has been indicated, the current standards for licensing private entities using international frequencies suggests that something of the idea of comity is already at work. Finally, the proposed principles could authorize states to establish content restraints but leave it to each state to enforce those restraints by control over receiving sets or bilateral and multilateral agreement. Adherence to such an arrangement might offend the spirit of the first amendment since it legitimates some constraints imposed by some states.

In a sense, the portion of the proposed principles that is most hostile to the first amendment involves the automatic constraints on material that, in the American context, would be characterized as involving national security. Ideas and information that are unsettling, that are hostile to the reigning regime are the very ideas that the first amendment was designed to protect. As the Draft Convention is now phrased, the United States would be adhering to an agreement that prevented foreign senders from sending messages to Americans that might be considered subversive by the government. Such an agreement would almost certainly infringe too substantially on first amendment rights and could not be justified by a legitimate federal interest. In no case has the Supreme Court indicated that the first amendment would brook a curb on incoming information where that curb was directed at the political or ideological content of the material. In that respect, television and radio are on an equal plane with other media.

All this is to say that in the structuring of an international order for regulating direct satellite broadcasts our domestic law, including the first amendment, allows some play but has its areas of somewhat abused rigidity. International control that classifies, that protects existing distributors of information, that shelters young viewers from obscene programming, that selects among competing applicants on the basis of merit—all this can dwell in

the tent of the first amendment. But heavy-handed censorship will not work where there is a specific content control that touches upon ideas relevant to the political structure of the state and its relationship to other states. That is the heart of the first amendment. If the international community is to institute such restrictions on the free flow of information, it must not ask the United States to enforce the rule.